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The New York Mortgage Commission

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contracts relating to labor as they may agree upon." (Italics interpolated.)²⁸

And further, I believe that it unquestionably falls within the prohibition prescribed by the United States Supreme Court, that:

"* * * since a State may not strike them [life, liberty or property] down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view."²⁹

The act attempts to make legal what otherwise would be illegal—the interference with a contractual condition of employment. The fact that it assumes only to restrict the remedy does not save it, since the effect of taking away the only adequate remedy to protect a right is to take away the right infringed upon.

WESLEY DAVIS.

THE NEW YORK MORTGAGE COMMISSION.—Continuing to stress the chaotic conditions which have warranted past mortgage legislation,¹ the legislature of the state of New York passed an enactment creating a Mortgage Commission² to supersede the authority of the state superintendent of insurance and the state superintendent of banks under the Schackno Act.³ To outline the conditions calling for this legislative action would be a needless repetition of that which is common knowledge and of that which has been the subject of much discussion in previous issues of this Review.⁴

The Mortgage Commission Act presents problems similar in character to those encountered in the preceding mortgage legislation. It is thus advisable for us to retrace and delve back into past legislative actions and court decisions to determine the constitutional restrictions by which the courts have bound statutes of this type.

²⁸ *People v. Marcus*, *supra* note 2, at 259.

²⁹ *Coppage v. Kansas*, *supra* note 2, at 17-18.

¹ Note (1934) 8 ST. JOHN'S L. REV. 208; *id.* 315; Legis. (1934) 9 ST. JOHN'S L. REV. 266; Feinberg, *The New York Mortgage Moratorium Statute* (1934) 9 ST. JOHN'S L. REV. 71; (1934) 34 COL. L. REV. 663.

² Laws of 1935, c. 19.

³ Laws of 1933, c. 745.

⁴ *Supra* note 1.

Mortgage legislation of an emergency character was introduced early in our national history,⁵ and the courts at first held that the moratory legislation was invalid as inimical to our Federal Constitution, as impairing the obligations of contracts.⁶ But the tendency of the courts to hold similar statutes unconstitutional began to wane as our concept of "police power" began to encompass itself with the cloak of public welfare legislation.⁷ It is true that at first, public policy was applied in a limited capacity, to attempts made to use it in aiding the validity of moratory legislation. It was not until a comparatively recent date that the Supreme Court of the United States allowed the police power, if validly exercised, to take a paramount position over the contracts clause of the Constitution.⁸

The second landmark in the formation of the present concept of police power and its relation to present mortgage legislation was reached in the Rent Cases.⁹ A shortage in housing facilities resulted in dire consequences. Many states passed legislation providing for reduced rentals; and, what is more significant, they provided for the tenant's holding over upon the expiration of the set term or leasehold, if a reasonable rental were paid.¹⁰ The statutes were attacked as violative of the 14th Amendment in that they were deprivations of property without due process of law, and as violative of Art. 1 §10,¹¹ inasmuch as they impaired the obligations of contracts. The Supreme Court of the United States held the statutes constitutional on the ground that an emergency existed.¹² It is evident that the Supreme Court of the United States has made a decided change in its earlier attitude towards moratory legislation, in that it now holds that the police power may be used to foster public welfare in derogation to constitutional rights, provided of course, a state of emergency exists.¹³

With this definitely established, the Supreme Court of the United States took another forward step in sustaining liberal moratory legislation when it upheld a Minnesota statute¹⁴ which extended the period for the mortgagor to redeem upon the proviso that the mortgagor

⁵ Jones v. Crittendam, 4 N. C. 55, 1 Car. L. Rep. 385 (1814); Halloway v. Sherman, 12 Iowa 282, 79 Am. Dec. 537 (1861); Wood v. Wood, 14 Rich. 148 (S. C. 1867).

⁶ Art. I, §10.

⁷ Chicago & Alton R. R. v. Traubeger, 238 U. S. 67, 35 Sup. Ct. 678 (1914).

⁸ Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127 (1905).

⁹ Block v. Hirsch, 256 U. S. 135, 41 Sup. Ct. 458 (1921); Marcus Brown Holding Co. v. Feldman *et al.*, 256 U. S. 170, 41 Sup. Ct. 465 (1921); Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289 (1922).

¹⁰ Act of October 22, 1919, c. 80—"District of Columbia Rents," 41 STAT. 297, 298, 301; N. Y. Laws of 1920, c. 942, 947.

¹¹ No state shall pass any law impairing the obligation of contracts.

¹² *Supra* note 9.

¹³ In Block v. Hirsch, *supra* note 9, the court stated that circumstances might change a private matter into one of great public concern.

¹⁴ Laws of 1933, c. 339.

shall pay a *reasonable* rental value of the premises towards interest, taxes, insurance, and the mortgage indebtedness. In *Home Building & Loan Association v. Blaisdell*,¹⁵ the court, after reviewing past mortgage legislation and decisions and past and present concepts of police power, sustained the validity of the statute and stated:

"The economic interests of the state may justify the exercise of its continuing and dominant power notwithstanding interference with contracts. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."

To state the decision in a more emphatic and definite form: a statute may affect private contracts and their obligations and yet be valid as an exercise of the police power when

1. an emergency exists to characterize that which is of private interest, one of public concern;
2. the legislation changes the contractual obligations in a *reasonable* manner and towards a *reasonable* end;
3. the legislation is temporary.

With this criteria in mind, and restricting our discussion to one phase of New York State mortgage legislation—that relating to guaranteed mortgage certificates¹⁶—we note that former legislation was held constitutional because it fully complied with the test set forth in *Home Building & Loan Association v. Blaisdell*.¹⁷ It is worth while to quote from the opinion on the question of whether this statute contemplated a *reasonable* change in the obligations of mortgage certificate contracts. The court said:

"The fairness of these provisions is evident. They do not give to a majority in interest, however large, the power to coerce another holder to accede to any plan of reorganization by the majority. They do not give the court power to coerce a single holder to accede to any plan of which the court approves. They do give the court authority to approve a reorganization plan which is [affirmatively] consented to by two-thirds in

¹⁵ 290 U. S. 398, 54 Sup. Ct. 231 (1934).

^{16a} But see Feinberg, *op. cit. supra* note 1.

¹⁶ *Supra* note 3.

¹⁷ *Supra* note 15.

amount of those interested, and to declare such plan effective.”¹⁸ (Word in brackets interpolated by writer.)

The creation of the Mortgage Commission is New York's second major effort in the mortgage certificate field. Primarily, the purpose of its creation was to meet the existing mortgage crisis “by conferring power upon a new state agency” which would act promptly and would “encourage, promote and facilitate self organization by the holders of mortgage investments until such time as there may be established other effective organizations for the administration of their interests,” and in this way “protect the vital interests of the state.”¹⁹

It is not the intention of the writer to herein detail the Act, but merely to point out its important provisions and those relevant to a discussion of their constitutionality.

The Commission is to consist of three members appointed by the Governor with the consent of the Senate.²⁰ A perusal of the general powers of the Commission reveals a similarity to those entrusted to the superintendent of insurance and the superintendent of banks under the Schackno Act. A significant general power which seems not to have been previously conferred under the Schackno Act is the right

“to negotiate with agencies of the federal government and the state of New York and any other public and/or private corporations, individual or associations for relief, by loan or otherwise, of holders of mortgages and/or mortgage investments. To accomplish this purpose, it [the Mortgage Commission] may organize a subsidiary corporation * * *.”²¹

Some of the more important provisions of the limited powers include the right

- “1. To extend the date of maturity of any bond, note, other evidence of indebtedness or of any mortgage, or the date of payment of the entire or any part of any installment of principal thereof due under a mortgage covering real property under its jurisdiction;”²²
- “2. To waive, reduce the rate, and/or extend the time of payment of interest payable under any bond, note, other evidence of indebtedness or under any mortgage;”²³

¹⁸ *Id.* at 437, 438.

¹⁹ *Supra* note 2, art. I, §1.

²⁰ *Id.* art. II, §2.

²¹ *Id.* art. IV, §17.

²² *Id.* art. IV, §1 (Limited Powers).

²³ *Id.* §2.

- "3. To borrow funds for any of the following purposes:
- a. to pay taxes, assessments * * *.
 - b. to preserve or rehabilitate by alteration or repair, or otherwise the property covered by a mortgage * * *.
 - c. to pay foreclosure costs * * *.
 - d. to pay any item of cost or expense * * * incident to the * * * preservation * * * of any of the several properties being administered by it.²⁴
- "5. To sell or exchange any bond, note, other evidence of indebtedness or any mortgage or property acquired by it and/or to release one or more parcels from the lien of any mortgage upon such terms and conditions and for such consideration as the Commission may deem proper * * *.²⁵
- "6. To formulate and carry into effect any plan of reorganization * * *.²⁶
- "7. To exchange the whole or part of any bond or mortgage or properly acquired by it, for securities issued or guaranteed by any public corporation now or hereafter organized pursuant to an act of Congress * * *." ²⁷

In noting the procedure whereby the Commission is to exercise the aforementioned limited powers, one becomes cognizant of the fact that upon this point a constitutional problem may arise. The Act provides that whenever a plan proposes to exercise any of the limited powers, the court shall not be permitted to approve the plan, if the holders in the aggregate of more than thirty-three and one-third per cent, of the face amount of the mortgage investment affected, file *acknowledged* dissents with the clerk of the court, prior to a date fixed by the court.²⁸ All holders of mortgage investments who do not dissent in this manner before the time has elapsed are deemed to have affirmatively assented to the plan.²⁹ Where the plan of reorganization involves any of the acts set forth in subdivisions five, six, and seven of the limited powers detailed above, such plan must contain a proviso that the dissenters may have the court determine

²⁴ *Id.* §3.

²⁵ *Id.* §5.

²⁶ *Id.* §6.

²⁷ *Id.* §7.

²⁸ *Id.* art. V, §7.

²⁹ *Ibid.* Where the dissents are filed too late, or are not acknowledged, the court has no authority to regard them as proper dissents under the statute.

the value of their respective mortgage investments as of the date of the promulgation of the plan.³⁰

The Commission has, as yet, not functioned. Obviously, its constitutionality has not been the subject of attack. Thus, any rationalization on the subject must be one by analogy. The constitutional feature of the enactment is no doubt narrowed to the question of whether the court can classify as *reasonable* the procedure whereby the Commission assumes its limited powers. Referring again to the Schackno Act, it is to be noted that a plan of reorganization required the *affirmative approval* of at least two-thirds of the holders of the investments involved. Will the courts hold the instant statute equally valid, when a plan is to be deemed approved by those not *affirmatively dissenting*? In the first instance, the burden of having the plan approved is upon those seeking its *approval*; whereas in the instant case, the burden is shifted to those who do not approve, to *affirmatively dissent* in order to protect their interests. Does this legislation seek its end in a reasonable manner? What is reasonable is a question that differs with courts and circumstances. It is thus made difficult for us to conclude as to a determination of these questions if they should ever arise.

We have already noted that the dissenters shall have the option of having their investments evaluated and protected,³¹ if the plan of reorganization is as to one of the limited powers, numbered five, six or seven outlined above. Thus, if the plan relates to subdivision two of the limited powers which permits the Commission

- "2. To waive, reduce the rate, and/or extend the time of payment of interest payable under any bond, note, other evidence of indebtedness or under any mortgage,"³²

the dissenter is not protected.

Here again, the problem is whether the courts shall deem this inequitable and unreasonable in the light of the fact that a survey of the records in the county clerk's office reveals that out of five hundred and two plans submitted to the court for its approval during a period when the Schackno Act was in operation three hundred and eighty related to extension and reduction.³³

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Supra* note 23.

³³ CASES TRIED THROUGH FEBRUARY 7, 1935

	Plans	Amount
Corporate	80	\$9,424,650
Trustee of Mortgage.....	2	810,000
Trustee of Real Estate.....	12	3,085,663
Extension and/or Reduction; Servicing by Company or Corporation	380	55,300,500
Outside Servicing.....	13	7,129,000
Group Mortgages.....	4	748,400
Sales Plan.....	11	1,464,600
Total	502	\$77,962,813

Protection of the interests of dissenters is not new to the law. It is recognized in the law relating to corporations, wherein we note that in the consolidation of stock corporations,³⁴ in the voluntary sale of their franchises and property,³⁵ and in the matter of dissolution without judicial proceedings,³⁶ two-thirds of the holders of stock entitled to vote thereon must first approve before the plan can be consummated. Those not voting in favor of such procedures are entitled to demand payment for their stock.³⁷ Although a distinction must be made between mortgage certificate holders and holders of stock, in that the latter purchase their stock on the implied contract that the three changes mentioned above are within the corporate powers as indicated by the corporation law, yet it is analogous in one sense to the Schackno Act in that it places the burden of getting the desired result, whether it be consolidation, sale or dissolution upon the parties so favoring it.

Article 6 of the Act provides two methods whereby the control of the Commission can be terminated:

1. If fifty-one per cent of the mortgage holders petition the court, the Commission is required to show cause why its control should not be vacated; and upon answer, if the court is satisfied that it is for the best interests of the holders of the said mortgage investments, the Commission's control shall be ordered terminated;³⁸ or
2. If the holders of mortgage investments formulate a plan of reorganization contemplating the withdrawal of commission control, and the plan is promulgated by a sufficient amount of persons interested as stipulated by the statute,³⁹ the court may voice its approval provided one-third of the holders fail to affirmatively object by filing acknowledged dissents. Under this subdivision, provision is again made for payments to the dissenters if they should desire to exercise that right.⁴⁰

³⁴ N. Y. STOCK CORP. LAW §87, as amended by Laws of 1934, c. 764.

³⁵ *Id.* §20, as amended by Laws of 1934, c. 764, subd. 2.

³⁶ *Id.* §105, subd. 9.

³⁷ *Supra* notes 34, 35 and 36.

³⁸ Laws of 1935, c. 19, art. VI, §9.

³⁹ *Id.* art. VI, §10.

- (1) By 20 per cent if the face amount of such mortgage investments, where its outstanding mortgage investments do not exceed five million dollars.
- (2) By 15 per cent if the face amount of such mortgage investments, where its outstanding mortgage investments exceed five million dollars and do not exceed ten million dollars.
- (3) By 10 per cent if the face amount of such mortgage investments, where the total face amount of such outstanding mortgage investments exceeds ten million dollars.

⁴⁰ *Ibid.*

The two conspicuous provisions remaining are

1. that the liability of any guaranty corporation in respect to any mortgage investments sold shall not be discharged by any action pursuant to this Act except as is expressly provided in any plan promulgated and approved.⁴¹
2. that proceedings under the provisions of the Schackno Act in the promulgation and approval of plans of reorganization are still permitted, save that the work shall be directed by the Mortgage Commission, instead of the officers mentioned in that Act.⁴²

The Mortgage Commission Act is not a panacea for the guaranteed mortgage investment problem because it is a measure of temporary duration.⁴³ That it shall serve an important need, cannot be doubted.⁴⁴ But the collapse of the mortgage market was caused, in part, by the general prostration of land values, and no appreciable rehabilitation can be in prospect unless the Act be supplemented by measures designed to create anew, a market for mortgage investments by restoring the props to realty prices.⁴⁵

NATHAN SLEWETT.

⁴¹ *Id.* art. IX, §25.

⁴² *Id.* art. VIII, §18.

⁴³ The Act shall remain in effect until Jan. 1, 1940.

⁴⁴ Address by Supt. of Insurance Van Schaick, N. Y. L. J., March 15, 1935, at 1:5.

⁴⁵ *Ibid.*